<u>MICHIGAN RULES OF PROFESSIONAL CONDUCT</u>
<u>MICHIGAN RULES FOR IMPOSING LAWYER SANCTIONS</u>

SYNOPSIS OF NOTES FROM PANEL DISCUSSION CONDUCTED ACROSS THE STATE BETWEEN JANUARY 2005 AND APRIL 2005

THE PROPOSED "IN WRITING" REQUIREMENT

Over 60% of malpractice claims involve conflicts of interest issues. Under the proposed rules, consent or waiver of conflict may be, "in writing." This requirement has been rejected by many states. It would be irrelevant if there were an actual admission by the client that s/he waived the conflict, or if there were no injury to the client resulting from the conflict.

Look at the, "in writing" requirement: conflict of interest waivers must be confirmed in writing.

Look also at the, "informed consent," definition. There are four requirements: disclosure of facts; disadvantages; risks; advantages; options. This does not need to be in writing.

There are 7 rules that are affected by the "in writing" requirement. A conflict of interest waiver would not be effective unless it is in writing, although it would not need to be signed by a client.

Confirmed in writing requirement appears in 7 different rules. It requires the creation of an exhibit for effective waiver of a conflict. You can currently do it verbally. The new rule says even if you've got actual consent, it has to be confirmed in writing by the lawyer. It was a compromise to a previous proposal requiring all fee agreements to be in writing.

THE PROPOSED "INFORMED CONSENT" REQUIREMENT

With regard to the "informed consent" requirement, disclosure is required to explain risks and alternatives.

The proposed informed consent requirements are also significant.

Informed Consent requirement – if the informed consent was not adequate, then it is insufficient. Not required to get it in writing, though

THE PROPOSED "DUTY TO PROSPECTIVE CLIENTS" REQUIREMENT

Look at the proposed new duties to prospective clients.

New rule introducing a series of obligations to potential clients.

Question about 1.18, Prospective Clients – It doesn't mean there's no rule at all about that right now. There are consistent rulings from the Court that say that you cannot breach confidences of a prospective client. But now there may be a duty of informed consent to a prospective client, which would require us to give legal

advice to someone who isn't and may never be a client in order to get the informed consent. It's a technical catch 22. The Representative Assembly did not recommend adoption of that rule.

THE PROPOSED "DIRECT COMMUNICATION" EXCEPTION

MRPC 4.2 states that an attorney shall not communicate with a represented party without going through his/her attorney. The proposed rule creates a law enforcement exception. Although it may be intended to allow the government to contact the mob before talking to the mob's lawyer's, the rule would apply to all government lawyers, not just prosecutors. Should the rule apply to all lawyers and if not, should it apply to none?

Under Rule 4.2, a lawyer may not engage in direct communication with opposing party without the party's attorney present. Under the proposed rule, law enforcement would be able to talk to parties without their attorneys present. This would apply to all government attorneys, including, eg., attorneys general. No other state has this exception.

4.2 No contact with a represented party without the permission of the opposing party's lawyer. The ABA model changes "represented party" to "represented person." The Michigan proposed versions are: (1) the old rule, which is no contact; or (2) the rule does not apply to government lawyers, which would apply to all federal agencies engaged in investigating or prosecuting a crime.

Rule 4.2 – A lawyer may not engage in direct communication with a represented party without the consent of the party's attorney. The proposed rule is that prosecutors should be allowed to talk to people who are represented by lawyers. Option A: Standard rule that you can't talk to a represented party. Option B: Exception that applies to all government lawyers engaged in any criminal or civil prosecution. If you are worried about government lawyers talking to a person without consent of their lawyer or two groups of lawyers having different rules to live by, then comment. There are only 4 comments so far on this rule that are posted on the Supreme Court website.

MRPC 1.11 proposes a special conflict of interest rule for government employees.

CONCERNS REGARDING CIVIL LIABILITY FOR VIOLATING RULES

The proposed rules would, if violated, establish a standard of care, which in turn could be used in malpractice actions.

There are more than 150 changes being proposed to the Michigan Rules of Professional Conduct. For example, "should" is changed to, "shall", which creates a duty and therefore grounds for a professional negligence action.

While some argue that the proposed rules are quasi criminal, others argue that they are not: rather, their purpose is to protect the public.

The Scope of the rules is also a concern: Currently, they are not intended to set the standards for practice. The new rule would represent the standard. This suggests that a violation of a rule would become a basis for a legal malpractice civil liability claim

Currently, the Rules are not the basis for civil liability. The proposed rule provides a basis for civil liability.

We increasingly find the Rules serving as a standard in civil malpractice suits.

Concern is that we will see this in civil litigation. The client, when asked to pay the bill, will say that since you didn't get the waiver in writing, I not only owe you money but you must give me back what I paid you. The supreme court is asking what we think about these requirements. They seem to be open to comment about this. So far, the commentary has been mostly limited to bar disciplinary authorities versus the average practitioner. We need your views on this expressed to the Supreme Court.

The SCOPE of the rules currently says the MRPC are not intended to serve as a standard of practice, which means cannot be used as a basis for a malpractice cause of action. The new rule would permit violation of the rules to be used as a standard of practice in a malpractice case.

Question: Did insurance coverage come into play in your discussions?

Answer1: This is something that weighed heavily in the minds of the grievance committee. Those who practice lawyer defense liability are very worried about this. It will have an impact on the insurance premium paid by the particular lawyer in difference between private reprimand and public admonishment, the more of it you have, the more civil liability you have, the higher the judgments and verdicts, the higher EVERYONE'S insurance premiums become. If you have a negligence claim against a lawyer and know that the sanction is nothing LESS than a suspension, don't you think that's leverage in the malpractice case?! Your colleagues say I've never had any problems, but this is an example of the impact on our entire profession regardless of whether you are involved in the discipline system.

Answer 2: All of the standards say they are "GENERALLY APPROPRIATE" and then there's mitigation and aggravation. So Answer 1 is a scare tactic by saying that there is no sanction less than a suspension. The sanctions are not intended to be guidelines. The standards only provide rough gradations, and you apply them to the individual and the offense.

Answer 3: One of the great debates in the ABA was theft. New Jersey felt that EVERY theft should result in disbarment. John said, "what if the person intentionally steals a penny and then replaces the penny a minute later." It'd meet the standards and he'd have no legal career. The result is absurd. The new Jersey courts just don't call it theft to get around it. You have to have flexibility.

RULE NOT PROHIBITING SEX WITH CLIENTS

The Court does not propose to adopt the rule banning sex with clients.

No sex with clients – the court won't adopt it but many other jurisdictions have it. Although it is prohibited if it would materially adversely affect your representation of the client.

NON-REFUNDABLE RETAINERS

CONFIDENTIALITY

1.6(b)(5) regarding confidentiality and secrets may lead attorneys to seek legal advise regarding whether they are in compliance with the rules. The ABA position punishes attorneys for disclosing client confidences even if negligently, for any reason. The Michigan rule is that only knowing disclosure can result in discipline. The proposed change to the Michigan rule is that errant disclosures would be disciplined.

No state has adopted the ABA model rule that no client communication can ever be disclosed under any circumstances.

Rule 1.13 regarding client protected information: the changes are a reaction to the Enron case regarding required disclosures of the client information.

Michigan's rule requires that the breach of confidentiality is knowing, not negligent.

1.6(b)(5) – Allows lawyers to contact a lawyer to get ethics advice. Currently, there's an argument that currently by even asking for advice, you run the risk of giving away client confidences. This would be an improvement in the rules to allow us to get advice.

NON-MERITORIOUS LITIGATION

The proposed sanction for filing nonmeritorious litigation (a frivolous claim) would be disbarment, not just suspension or reprimand.

6.21., 6.22, and 6.23 re: frivolous litigation under 2.114. Non-meritorious litigation. If a lawyer files such a case, the sanction that will be "generally" used will be DISBARMENT. Not based on frequency of filing such cases, even just

one. It will have a chilling effect on cases like Brown v Board of Ed. This will fundamentally change our ability to practice. It’s important to also remember that the people who are enforcing the rules change, so the rules have to be sound.

Is a determination of frivolity a violation of the rules? The solution to stop frivolous claims is not to cap damages, it's to come down on frivolity in the sanctions.

In Michigan, where court has made certain determinations, they are to be considered prima facie evidence and the burden of proving the frivolity is met. The reality, he's seen very little frivolity findings in Michigan. Some Rule 11 situations, but 3.1 (meritorious claims and contentions rule) don't necessarily add up – there are volumes defining the differences between those two. 3.2 is largely broad and doesn't accurately or adequately define frivolity. It's tough to get around a panel's decision when they say frivolity has happened

Frivolous lawsuits are an area with the most sparse discipline rules. Of all the areas of complaint from the public and lawyers, this is the most serious problem. He'd like to see the standard lower for suing lawyers.

6.2 abuse of legal process in supplemental package – If you are eligible for a reprimand generally, and you have brought an action that's not frivolous, reprimand is sufficient. If there is a judicial finding that you brought it frivolously, you are up in the disbarment category. The Bush administration is going to place a lot of emphasis on this topic. Courts are going to see more procedures that are meant to make these kinds of findings. If judge makes a finding of knowingly frivolity, you are elevated into the disbarment category. This ought to give you pause! This is great leverage and power in the civil context – your opposing counsel can file a grievance. 2.114 filing an action without a sufficient basis.

COSTS CHARGED TO CLIENTS

MRPC 1.4(c) regarding communications: an informal ethics opinion states that the file belongs to the client vs the R/A proposal acknowledges that electronically stored information belongs to the attorney – a complete change from the existing rule.

1.5(a) pertains to costs and expenses – the proposed rule would clarify that reasonable is not necessarily the same as actual costs.

Rules concerning costs: How do you allocate them? There’s a Michigan opinion from 1994 saying you can only charge actual costs to your client. Rule 1.5 allows you to charge reasonable costs. Michigan opinion says since there’s no definition of reasonable, you have to only charge actual. ABA says you can charge reasonable costs. Even if they’re not actual to the penny. In Michigan, the

reasonable cost language is being proposed. It says it's not a change, just a clarification, which flies in the face of that ethics opinion.

FILE RETENTION

A 1994 ethics opinion states that only actual costs can be charged to a client. Rule 1.5 proposes that "reasonable" costs can be charged.

Question – what about file retention policy?
Answer: Current requirement says you have to have one and it has to be made known to the client. R-5 is the formal opinion that gives you a procedure for establishing a file retention policy. Or go to the R/A website re proposed changes, eg 1.4 which says that it's the lawyer who owns the file and the client who owns the information. Purpose is to recognize that many docs are only electronically stored and if client owns file they also own part of your C drive. Hasn't been proposed by S Ct but R/A is considering.

COURTESY

The Court proposes to move Rule 6.5 to 6.6 regarding treating lawyers with courtesy and respect. The ABA declared the rule unconstitutional

6.5 is being moved to 6.6 – It requires lawyers to treat one another with respect and courtesy. The Michigan disciplinary board has said this rule is unconstitutional. The court is currently taking this up in a case against Geoffrey Fieger. The commission has gotten a reputation as the word police. It's important to know whether the court considers this language constitutional or not.

BACKGROUND OF DISCPLINE SYSTEM

In 1978, the Court bifurcated the disciplinary system. The hearing panel has the authority to disbar a lawyer and therefore listens to evidence like a sentencing hearing. The Supreme Court ordered the ADB to adopt the ABA standards and submit Michigan standards within 2 years. The ADB recommended keeping the ABA standards as a basis for consistency with other jurisdictions.

In 1978 when the Court bifurcated the system, the hearing panels were given authority to do the heavy lifting of disciplining lawyers. They hear arguments like you'd hear at a sentencing hearing. In 2000 the court heard 4 discipline cases. (You can appeal the ADB's decision to the Supreme Court). In one of the cases, they ordered the Board to provide proposed standards within 2 years. The Board did so and recommended that we keep the ABA standards as a basic model with

some tweaking. Reason is they are used in 30 other jurisdictions. In 2000 they published the proposed standards. But they did not publish a redline version.

Formerly, the amount of injury was used in the 1st or 2nd phase: the ADB proposal is that it be used in the 1st phase; Campell's proposal is that it be used in the second phase.

There are 3500 complaints/year filed. Half are dismissed 90% are closed without any action. 10% are closed with admonishments. Very few end up with suspension or disbarment. You probably will not be disciplined if you communicate with your clinet and do not misappropriate or commingle funds

The AGC is comprised of 6 lawyers and 3 non-lawyers. In 1978, the prosecutorial and decisional rules were split, with the main concern not being punishment but rather the protection of the public from bad lawyers.

There are 480 ADB hearing panelists across the state. The discipline system is two stages: adjudication and sanctions. Currently, the adjudication stage looks at the nature of the duty violated, the mental state of the attorney charged, and the nature and extent of any resulting harm. The proposed rules will change such that the injury/extent of harm will be removed from the first stage of the system to the second stage.

98% of all complaints are closed without investigation. ? complaints are issued each year. ? are resolved with confidential admonishments.

There are 480 volunteer lawyers who sit as discipline hearing panelists.

The Rules are applied to 3-4,000 complaints/year. 80% of complaints are closed without investigation because there is no merit. 10% are passed on to the ADB for investigation. “Frequent fliers” are continually in the discipline system. The failure to maintain communications with the client, negligence in acting, misappropriation of fees and fee disputes are the primary sources of action. The purpose of the rules is not to punish attorneys, but to protect the public. An admonishment is notice to a lawyer that conduct could rise to the level of discipline, but it is a private letter that is not part of the public record.

They get 3500 complaints/year. About ½ are immediately or quickly dismissed without an answer from the atty. 90% get closed with no action. Of the remaining 10%, half are resolved with admonishments which do not affect the lawyer's practice, and the other half a formal proceedings. If you don't misappropriate or commingle funds, you'll probably never hear from us.

Important to distinguish that a hearing before the ADB is like the sentencing hearing. Is he a nice guy? Career criminal? Go to church? All considered in sentencing phase. First we determine if there must be a sentence. The sanctions should not be considered until there's been a determination of a violation. Must

first say the atty violated a particular rule. Once there's misconduct, then, under these circumstances and given this atty, the only options are:

1. suspension
2. reprimand
3. disbarment.

And all 3 are public. We want option of private admonishment.

ABA adopted standards in 1986. John Berry part of that. Hearing panels and discipline boards in Michigan have been using these ABA standards since they were adopted by the ABA. They are general guidelines that can be tailored case by case for the individual. Sort out generally into the type of violation that merits a suspension vs a reprimand vs a disbarment. Using this initial sorting process of what was the duty violated and what was the intent, harm or injury, Board does not agree with Campbell that you can say prospectively that there won't be a situation where reprimand is not appropriate for some kind of conduct. It's not foreseeable. Everyone in Michigan and nationally knows that if you intentionally embezzle client funds, the outcome will be disbarment. It may not be your FAULT that $5,000 of client funds was not in the trust account for a period of time (may be your secretary's) but you are still responsible.

Each year, there are 3-4,000 requests for prosecution: most result in no prosecution. Grievances most often result from poor communications, fee disputes, or the neglect of the client. Almost all attorneys look first to the discipline section of the Bar Journal: it’s very important to us.

Only 5% of complaints end in discipline. Therefore, the biggest focus has been on the Rules.

BACKGROUND OF ETHICS RULES AND SANCTION STANDARDS

By these rules, we are sending a message to the public about how we conduct and discipline ourselves.

The standards are a reflection of how we view our profession. Until now, our ethics cannons have been thought of aspirational: with the new standards, we will have both aspiration and law. We will have rules that are more specific guidelines, and there will be more instances of strict liability. Michigan leads our country in discipline, both in the way it is set up and the way it works.

It is a major overhaul to the Rules. The discipline system has not been reviewed since the McKay commission in 1990.

Question: This looks like a major overhaul. Why are we even doing this? Are the rules broken and need to be fixed? Is it just because the ABA came out with a model code?

Answer 1: The ABA revisions per ethics 2000 was the big impetus. Enron and Worldcom raised 1.3 – protecting client interests – also raised awareness. 1.13 also an important part of it. The Supreme Court told the ABA Disciplinary Board to apply ancient 20 year-old standards when imposing discipline. Time is one of 8 factors of a reasonable fee.

Answer 2: There's been a large lapse of time and major changes in our practices (MJP and MDP) since the rules were adopted. There is also increased concern about protecting the public. The ABA actually thought they were taking a minimalist approach. The ABA rule proposed in 1983 that any breach of confidentiality no matter what the reason, is a breach of the rules. Nobody adopted that.

On 6 different standards they are asking do you want alternative A or B. The standards came into being in 1986 while the rules came into being in 1983 but were not adopted until 1985. They looked at caselaw in the 70's to create the standards. He believes in Michigan we need to do things different than the ABA.

When the ABA set up the standards, they read thousands of cases. If you think it's bad to have unclear standards, try having none. It's hard to pick out what is the standard of harm, aggravating or mitigating standard. These rules are intended to be flexible and that's why they use the word "generally" so often. If you have something strong to say about the type of sanction that should be handed down, then now is the time to say it. Eg, should taking $5 out of an account for 5 minutes result in disbarment.

How did this all develop? ABA started looking at potential sanctions with nothing in front of them. Define the violations and then the corresponding sanctions. John has read thousands of cases. Problem was lawyers left in lurch because Court not spelling out violation or factors using in determining the discipline. The very least standards should do is require a look at the harm, the intent, the aggravating and mitigating factors. Very important not to confuse the standards and rules. The ethics rules themselves are strict liability, but others have intent elements and come out of strict liability. Some states actually have a harm provision in the rule, itself. Need to look at standards and violations together.

The ABA hasn't done a good review of the standards since they adopted them. That's a problem. If there's enough flexibility in these things, the Courts are going to use the factors in a way to resolve the cases in a way the Court feels is best. The Courts and the Board should find a violation, apply the aggravating and mitigating, and then issue the sanction. ABA debated whether every standard should be connected to a rule? The ABA said no. The standards are not met to

cover the ethical rule but rather the criteria. It was IMPOSSIBLE to go back and apply a standard to every rule.

More attention should be paid down the road, after we have experience. The ABA had an appendix that took you to the sanction to apply to each rule. He thinks we should move the appendix into the rule. The lack of *stare decisis* is a problem. Every case is *sui generis*. Setting a standard is going to help obtain continuity and fairness.

The vast amendments (150) in the MRPC and the completely new standards are the most important changes he's seen in the profession. Rise to the level of invention of the light bulb. We need to talk about it more. You have a lot of materials – take it to your local bar meeting and generate more conversation about this. Our colleagues are smart and we haven't heard from them. Not aware it's going on. The Grievance Committee will get somebody there if you want someone to talk to your local bar or affinity group about it.

The changes proposed to the Rules of Professional conduct include: how we analyze conflicts of interest; an affirmative duty to prospective clients; a definition of “protected information,” how to accept a retainer and hold client funds; and disbarment for filing an action determined to be frivolous by a court.

Why you should spend time commenting on this: It will affect all of us outside of the disciplinary process. We want to comply with the rules to begin with. These are standards, not suggestions, for discipline.

ADMONISHMENTS, REPRIMANDS & SUSPENSIONS

Admonishments have been used where there is a need to tell the lawyer their conduct was wrong, but more formal action is not necessary. “Frequent fliers” are attorneys against whom grievances are repeatedly filed. There are 2 types of suspensions. Anything less than a 6 month suspension, no panel hearing is required to prove the worthiness for reinstatement. than A suspension of greater than 6 months requires the attorney to prove s/he is ready to practice law again. In Michigan, most suspensions are 30-90 days, and the majority are issued by consent order. Attorneys must inform their clients of suspensions.

The ADB and Grievance Cmte wants to be sure there's a breadth of discretion available to adjust the circumstance in each case and not eliminate forms of discipline from any category of violations. The proposed sentencing guidelines remove private discipline. ADB wants to insert harm or potential injury.

Re: Reprimand – MSILS 4.6, 6.1 and 8.0 Is it ok that they are lumped together. Under Campbell's proposal, reprimand would not be available in some cases. Under ADB's proposal, reprimand would not be GENERALLY available. The Greivance Committee doesn't get that. The concern is that the guidelines will be

considered presumptively correct. Negligence and false statement to the courts. We have a duty to correct. Under these rules, it's a negligent false statement to a court and you don't want to eliminate reprimand as a sanction for this rule. We should preserve all of the possible sanctions in all of the possible cases.

Board felt that for a category of misconduct which, in Mi, there is no reported case above reprimand, we should see how things go. If you put in a rule violation for every standard, every time the Board wants to change a rule, they have to change the standard. Another example, all fraud committed by a lawyer has to fit into a particular rule. But what if you COULD arguably fit it into another rule and achieve a just result, why not let the Board use its discretion.

Question: Why do you want private reprimand letter to be public?
Answer: Only the AGC can issue an admonishment. It doesn't constitute discipline, so it does not have to be reported in other jurisdictions, for example. In Michigan, the term "private reprimand" is not a terms of art. Need clarification whether she's asking about admonishment or reprimand. It's an order imposing no discipline.

The ABA standards define suspension generally as more than 180 days. A suspension of more than 180 days requires the filing of a petition, a filing fee and a hearing. Suspensions are anything more than 30 days.

ORDER FOR CONSIDERING MITIGATING & AGGRAVATING FACTORS

How the state Bar feels about mitigation and aggravation is important.

DEGREE OF INJURY

One issue is when to consider the degree of injury in the discipline system. This includes the nature of the duty, the intent or knowledge, and the degree of injury. The proposed standards remove this factors from consideration in determining whether there has been a violation.

Whether the factor of amount of injury is used at the front or rear end of the process. This is a big issue.

Under these proposed rules, there does not need to be cause or harm. You could be in violation if you didn't return a phone call in 2 days if there's a standard that says it should be returned in 1 day.

SCIENTER

True that with some rules scienter is there. Doesn’t matter under some rules. EG, if you have a conflict of interest, it doesn't matter what excuse you have, it's a conflict of interest. It is or it isn't. You need to look at the intent requirements.

They are very important to us. The reality that the rules themselves and the disciplinary process are leverage. The rules should be objectively clear in describing the violation and levying the sanction.

Knowing conduct, when a lawyer mistreats someone based on gender, etc., what does that mean

PRACTICAL RAMIFICATIONS

Question: How will these changes affect our actual practices?
Answer: Once the Court is done enacting, there will be plenty of courses on how to comply. One thing we need to ask the court is to give us an adjustment period between the time the rules are enacted and have to be complied with. The confirmed in writing requirement (he says electronic writing is ok). Rule 5.1 – supervisory responsibility – one lawyer can be held responsible for conduct of another. Large firms should have established policies for, among other things, supervising younger lawyers. The comment also says that partners or those in supervisory positions cannot assume that all their associates know or will abide by the rules. We are a self regulated profession and freedom does not come free. Another example, if you have an estate planning practice and have a bunch of mirror image wills, you will have to get informed consent in writing from both of those spouses before doing those wills, the minute the rule goes into effect.
Answer by Don Campbell: referral fees will be affected as well as non-refundable retainers.